

EMPLOYER STATUS DETERMINATION

Herzog Transit Services, Inc.

This is the determination of the Railroad Retirement Board concerning the status of Herzog Transit Services, Inc. (HTSI) as an employer under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Information about HTSI was furnished by its Vice President, Mr. Randy L. Poggemiller. HTSI was incorporated on July 28, 1993, and began operations on January 7, 1994. HTSI's business is to be a contract operator of commuter rail passenger service for public and private entities. At this time, HTSI's only contract is with Tri-County Rail Authority (TCRA), an agency of the State of Florida.¹ That contract requires that HTSI manage, operate, maintain, and provide the staff to run intrastate commuter rail passenger trains on the TCRA system, including operating the commuter trains, maintaining all TCRA rolling stock, constructing and maintaining TCRA stations, and communicating with CSXT and Amtrak regarding schedules, delays, etc. TCRA owns about 65 miles of track located in Dade, Broward and Palm Beach Counties in Florida. TCRA owns the cars and locomotives used for the commuter rail operation. Amtrak operates intercity passenger service and CSXT operates freight service over the line.

UTDC Transit Services, Inc. (UTDC/TSI) was the contract operator for TCRA from December 1989 to January 6, 1994.² In June 1993, HTSI entered into an asset purchase contract with UTDC/TSI. On October 8, 1993, TCRA awarded a commuter rail operation contract to UTDC/TSI and its assignee HTSI. At that time, HTSI purchased the assets of UTDC/TSI and later employed most of the employees of UTDC/TSI, which is no longer in business.

¹TCRA has been found not to be a rail carrier employer under the RRA and the RUIA. See Notice No. 89-35, April 19, 1989.

²On August 6, 1990, the National Mediation Board (NMB) determined that TCRA and UTDC/TSI were not covered by the Railway Labor Act (45 U.S.C. §151 et seq.) (17 NMB Nos. 88 and 89 (1990)). The Railway Labor Act defines the term "carrier" using essentially the same definition set forth in the RRA and the RUIA for the term "employer." See 45 U.S.C. §151 First. Mr. Poggemiller stated that HTSI purchased the assets of UTDC/TSI and operates, "in all relevant respects," a service similar to that formerly provided by UTDC/TSI.

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HTSI does not own any other company. Ninety percent of HTSI stock is owned by Herzog Contracting Corporation³, and ten percent is owned by Dr. William J. Ronan.

Section 1 of the RRA defines the term "employer" to include:

- (i) any express company, sleeping car company, and carrier by railroad, subject to subchapter I of Chapter 105 of Title 49.

Section 1 of the RUIA contains the same definition.

HTSI is a carrier by railroad, since it operates commuter rail passenger service for TCRA. However, that operation is not subject to the jurisdiction of the Interstate Commerce Act, since it does not transport passengers from a place in one State to a place in another State, but instead provides service between two points entirely within one State. See 49 U.S.C. §10501(b)(1). It is therefore determined that HTSI is not a rail carrier employer under the RRA and the RUIA.

Glen L. Bower

V M. Speakman, Jr. (Dissenting)

Jerome F. Kever

³Herzog Contracting Corporation was determined not to be an employer under the RRA and the RUIA in Legal Opinion L-90-79, issued on May 11, 1990.

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